Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

GLENN DAVIS, *(pro se)*

Petitioner

CITY OF TUCSON,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Glenn Davis, Plaintiff *(pro se)*
P.O. Box 26232
Tucson, Arizona 85726
(520) 870-8109

QUESTIONS PRESENTED

1. Whether, (the evidence and controlling law of), State Courts or Federal Courts determine the legalities, violations and that procedural requirements are met, concerning contractual rights, (of a "*city*" municipal government permanent employee who has passed probation), when a notice of intent to terminate, employees response to that notice and than termination of an employee, only for "just cause".

2. Whether a decision by the U.S. District Court of Arizona denying / not considering a motion for a new trial of its June 4, 2001 judgment under FRCP 60(b)(6), results in a manifest injustice, because of an intervening administrative decision along with a municipal hearing, governed by state law and than a subsequent state appellant court decision in which the evidence and controlling law was substantially different, the law has changed, the decision was clearly erroneous or work a manifest injustice.

3. Whether affirmation (summarily) by the U.S. Court of Appeals For The Ninth Circuit, which also denied / did not consider "petition requesting the Ninth Circuit to set aside the June 13, 2002 memorandum" of the same D. C. judgment, results in a manifest injustice, because of an intervening administrative decision along with a municipal hearing, governed by state law and than a subsequent state appellant court decision in which the evidence and controlling law was substantially different, the law has changed, the decision was clearly erroneous or work a manifest injustice.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner, Glenn Davis, (Pro Se)

Respondent, City of Tucson

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PETITION FOR A WRIT OF CERTIORARI

Glenn Davis respectfully petitions this Court for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (App., infra, 1-3) from which review is sought is unreported.

The opinion of the District Court (App., infra, 4-8) is unreported.

The opinion of the Court of Appeals State of Arizona (App., infra, 9-27) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on July 14, 2005.

The jurisdiction of this court is invoked under 28 U.S.C. §1254. Jurisdiction in the District Court was based on 28 U.S.C. §1331. Jurisdiction before the Ninth Circuit was based on 28 U.S.C. §1291.

STATEMENT OF THE CASE

This matter was originally filed in 2000, and final summary judgment was granted to the Defendant on June 4, 2001. App., infra, 32 -38 .

There was an intervening administrative decision along with a municipal hearing, governed by state law (by the employer infra, 24 – 29 and than 30-31,) and than a subsequent state appellant court decision (App., infra, 9- 23.) in which the

evidence and controlling law was substantially different, the law has changed(App., infra. 14- 23. esp. par. 5-10), the decision worked a manifest injustice.

(federal case law) Plaintiff is an African-American male. Mr. Davis was employed by the City's solid waste disposal department. Because of a chronic back injury he became disabled. As an accommodation for his disability the City transferred Mr. Davis to a position as a customer service clerk in the Streets and Traffic division, subject to a six-month probationary period. Mr. Davis was the only male employee in the position. At the end of the six months *he* was transferred to Parks and Recreation as a recreation assistant. He was again placed on six months probation, which he completed satisfactorily. App., infra. 25, paragraph 5. Plaintiff requested and was granted leave under the Family and Medical Leave Act ("FMLA") in May 1999. In August 1999 he was placed on medical leave without pay. App., infra. 4.

(intervening state and municipal case law) As of May 2000, Davis had not yet returned to work and thus had been absent from his employment for one year. On June 13, the city notified Davis that City Administrative Directive 2.01-7 mandated that medical leaves may not be granted for periods longer than one year (notice which was in error and fail to invoke Tucson Code § 10-12 (8), which was not a part of the pertinent hearing record and failed to define 10-10 (8)). App., infra. 24-29 and 47, last paragraph foot notes. When Davis failed to return to work by that date or otherwise provide the city with information as to when he would be returning, the city notified him on July 3 that his employment was terminated, effective August 21. App., infra. 13. Prior to his termination, Davis submitted his June 27, 2000 request for "reasonable accommodation under the ADA for light duty is contained in the record." The city failed to reasonably accommodate him under the ADA and under Administrative Directive 2.05-2 .App., infra. 22-23.

(federal case law along with supplemental jurisdiction, state case law claims) Plaintiff filed this suit on January 14, 2000. He made ten claims for relief: (1) intentional discrimination in violation of Title VII; (2) hostile work environment; (3) illegal retaliation in response to a previous ACRD complaint; (4) violation of the Americans with Disabilities Act ("ADA"); (5) violation of equal protection because of discrimination based on race, sex and disability; (6) violation of due process as a result of being denied his union grievance rights when transferred to a non-union job; (7) constructive discharge; (8) intentional infliction of emotional distress; (9) wrongful termination in violation of public policy; and (10) breach of the implied covenant of good faith and fair dealing. This Court granted summary judgment for the Defendant on all the claims except Claim 6, which it allowed further briefing on. After briefing the Court, summary judgment was also granted on this Claim in favor of the Defendant. App., infra, 13.

Plaintiff appealed to the Ninth Circuit Court of Appeals which denied his appeal and his request for en banc rehearing on September 11, 2002. Plaintiff also filed suit in the state superior and appeals courts, Davis v. Civil Serv. Comm 'n, No. 2CA-CV 2003-0081 (Ariz.App., Jan. 22, 2004), note that the Arizona Appeals Court refers to the Ninth Circuit memorandum and . App., infra, 21.

Plaintiff requested a new trial in this district court, pursuant to not only Rule 60(b)(1), but, factually to Rule 60(b)(1), (2), (3), (6). Compare App., infra, 41 to App., infra, 6.

Additionally, Plaintiff requested reconsideration and re-examination of state law of the District Court's prior decision and review of the Arizona Court of Appeals and the Ninth Circuit Court of Appeals decision, or his claims "as they relate to this Court's granting Defendants motion for summary judgment and supplemental jurisdiction." on the basis of violation of right of substantive due process under the

Fourteenth Amendment and violation of procedural due process. App., infra. 5 and 7.

Finally, the Ninth Circuit Court of Appeals decided to summarily affirmed the district court's judgment. - Appellant's "motion to stay the proceedings of the motions panel pending the decision of the petition requesting the Ninth Circuit to set aside the June 13, 2002 memorandum in no. 01-17102" was denied as unnecessary. All other pending motions and requests, including appellant's motion for appointment of counsel, were denied. App., infra. 1-3.

REASONS FOR GRANTING THE PETITION

State Courts determine the legalities, violations and that procedural requirements are met, concerning contractual rights, (of a "*city*" municipal government permanent employee who has passed probation), when a notice of intent to terminate, employees response to that notice and than termination of an employee, only for "just cause".

The procedural due process protections of the Fourteenth Amendment apply to deprivations of property interests. The existence and breadth of these property interests "are defined by existing rules or understandings that stem from an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Thus, the Court must look to state and municipal law to determine whether Plaintiff had a property interest in his position as a recreation assistant and could not be terminated without cause. This situation can be usefully compared to that in McGraw v. City of Huntington Beach, 882 F.2d 384 (9th Cir. 1989). In McGraw, the plaintiff had completed a probationary period in her original job and had become a "permanent" employee with property rights for procedural due process purposes.. Under Tucson's civil service rules. The Commission's role in cases such as this is to

determine whether "just cause" supports termination of the City employee

When Davis notifed the department about the conditions necessary to return to work by that date or otherwise provide the city with information as to when he would be returning. the city notified him on July 3 that his employment was terminated. effective August 21. App.. infra. 13. Prior to his termination. Davis submitted his June 27. 2000 request for "reasonable accommodation

The notice of intent to Terminate (notice which was in error and fail to invoke Tucson Code § 10-12 (8). which was not a part of the pertinent hearing record and failed to define 10-10 (8)) which could not have constituted just cause along with City Administrative Directive 2.01-7. App.. infra. 16-18. 25-28.44and47.

The Court of Appeals found that the lower court should remanded the case back to the Commission due to the Commission's failure to follow procedural requirements. primarily the sufficiency of the hearing notice. *Civil Service Comm'n v. mills*. App. 499. 534. P.2d 420 (1975)

State Courts determine the legalities. violations and that procedural requirements are met. concerning contractual rights. for "just cause".

Therefore. Plaintiff's requested relief for reconsideration and re-examination of state law of the District Court's prior decision and review of the Arizona Court of Appeals and the Ninth Circuit Court of Appeals decision. or his claims "as they relate to this Court's granting Defendants motion for summary judgment and supplemental jurisdiction." on the basis of violation of right of substantive due process under the Fourteenth Amendment and violation of procedural due process should have been granted incuding a new trial.

The decision by the U.S. District Court of Arizona denying / not considering a motion for a new trial of its June 4, 2001 judgment under FRCP 60(b)(6), results in a manifest injustice,

because the record presented is clearly a demonstration of actual injury and the presence of circumstances beyond the movant's control that prevented timely'dction to protect the movant's interests work a manifest injustice and relief should have been granted for a new trial.

Motions for relief from judgment under Fed. R. Civ. P. 60(b)(6) (in the interests of justice) must be brought within a reasonable time after the judgment was entered *(see* In re GAD. Inc., 340 F.3d at 334), and therefore Plaintiffs motion is untimely; Further, relief under Rule 60(b)(6) is reserved for "extraordinary circumstances" *(see* Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998) (relief under Rule 60(b)(6) should be granted "sparingly"), *cert. denied, 526 U.S.* 1040 (1999)): Finally, relief under Rule 60(b)(6) requires a demonstration of actual injury and the presence of circumstances beyond the movant's control that prevented timely'dction to protect the movant's interests (see Lehman, 154 F.3d 1010, 1017).

Affirmation (summarily) by the U.S. Court of Appeals For The Ninth Circuit, which also denied / did not consider "petition requesting the Ninth Circuit to set aside the June 13, 2002 memorandum" of the same D. C. judgment, results in a manifest injustice

A Ninth Circuit panel may reconsider an earlier ruling if the evidence on a subsequent trial was substantially different, the law has changed, or the decision was clearly erroneous or would work a manifest injustice: *see Richardson v. United States,* 841 F.2d 993, 996 (9th Cir.)

In a case governed by state law, the District Court must reexamine the controlling (state) law in the light of an intervening state court decision which specifically casts doubt on Ninth Circuit's ruling), amended, 860 F.2d *357* (9th Cir. 1988). *See United States v. Houser* **CONCLUSION**

For all the forgoing reasons stated above, GLENN DAVIS Petitioner, respectfully request that this Court grant this petition for a **Writ Of Certiorari**

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN DAVIS.	)	No. 05-15022
Plaintiff - Appellant.	)	D. C. No. CV-00-00032-WDB
v.	)	
CITY OF TUCSON.	)	JUDGMENT
Defendant - Appellee.	)	

Appeal from the United States District Court for the District of Arizona (Tucson).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is

AFFIRMED.

Filed and entered 07/14/05

App. 2

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN DAVIS,	)	No. 05-15022
Plaintiff - Appellant,	)	D. C. No. CV-00-00032-WDB
v.	)	
CITY OF TUCSON,	)	MEMORANDUM*
Defendant - Appellee.	)	

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Submitted July 11, 2005**

Before: SCHROEDER, Chief Judge, RAWLINSON and BYBEE, Circuit Judges.

The court has received appellant's notice of payment of the filing and docketing fees for this appeal.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

05-15022

A review of the record and appellant's filings indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam).

Accordingly, we summarily affirm the district court's judgment.

Appellant's "motion to stay the proceedings of the motions panel pending the decision of the petition requesting the Ninth Circuit to set aside the June 13, 2002 memorandum in no. 01-17102" is denied as unnecessary.

All other pending motions and requests, including appellant's motion for appointment of counsel, are denied.

AFFIRMED.

Filed and entered 07/14/05

App. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLENN DAVIS,	)	No. 05-15022
Plaintiff - Appellant,	)	D. C. No. CV-00-00032-WDB
V.	)	
CITY OF TUCSON,	)	ORDER
Defendant - Appellee.	)	

Pending before the Court is Plaintiffs Motion for a New Trial, filed on August 31, 2004. The Court granted Defendant's *Motion for Summary* Judgment on June 4, 2001. The issues relating to the Motion for a New Trial have been fully briefed, and for the reasons following the Motion for New Trial is **DENIED.**

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter was originally filed in 2000, and final summary judgment was granted to the Defendant on June 4, 2001.

Plaintiff is an African-American male. Mr. Davis was employed by the City's solid waste disposal department, in a union position. Because of a chronic back injury he became disabled. As an accommodation for his disability the City transferred Mr. Davis to a position as a customer service clerk in the Streets and *Traffic division,* subject to a six-month probationary period. The position is not considered a union position. Mr. Davis was the only male employee in the position. Before the six-month probationary period was completed, Mr. Davis received less than satisfactory performance evaluations. At the end of the six months *he* was transferred to Parks and Recreation as a recreation assistant. He

was again placed on six months probation, which he failed to complete satisfactorily. Plaintiff requested and was granted leave under the Family and Medical Leave Act ("FMLA") in May 1999. In August 1999 he was placed on medical leave without pay. On August 21, 2000, because he had failed to return to work, the City terminated his employment.

Plaintiff filed this suit on January 14, 2000. He made ten claims for relief: (1) intentional discrimination in violation of Title VII; (2) hostile work environment; (3) illegal retaliation in response to a previous ACRD complaint; (4) violation of the Americans with Disabilities Act ("ADA"); (5) violation of equal protection because of discrimination based on race, sex and disability; (6) violation of due process as a result of being denied his union grievance rights when transferred to a non-union job; (7) constructive discharge; (8) intentional infliction of emotional distress; (9) wrongful termination in violation of public policy; and (10) breach of the implied covenant of good faith and fair dealing. This Court granted summary judgment for the Defendant on all the claims except Claim 6, which it allowed further briefing on. After briefing the Court, summary judgment was also granted on this Claim in favor of the Defendant.

Plaintiff appealed to the Ninth Circuit Court of Appeals which denied his appeal and his request for en banc rehearing on September 11, 2002. Plaintiff also filed suit in the state superior and appeals courts, Davis v. Civil Serv. Comm'n, No. 2CA-CV 2003-0081 (Ariz.App., Jan. 22, 2004), which appear to have denied his claims.

II. THE MOTION

Plaintiff requests a new trial in this Court, pursuant to Rule 60 Fed.R.Civ.P., to review the actions of the Arizona

Court of Appeals and the Ninth Circuit Court of Appeals decision, on the basis of violation of right of substantive due process under the Fourteenth Amendment and violation of procedural due process.

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Plaintiff requests a jury trial. Plaintiff appears to base his request for a new trial on a mistake of fact.

III. ANALYSIS

Plaintiff requests a new trial in this Court under Rule 60(b)(1), Fed.R.Civ.P., which States, "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.... The motion shall be made within a reasonable time, and for reasons (1)... not more than one year after the judgment, order, or proceeding was entered or taken." Clearly this action is outside the one-year time limit and the Court may not grant relief from its Orders granting summary judgment to the Defendants in 2001.

Moreover, in this situation this Court is completely without jurisdiction to review any decision by the Ninth Circuit Court of Appeals, the Arizona Superior Court or the Arizona Court of Appeals, despite Plaintiffs claims of violation of Constitutional rights. Accordingly,

IV. CONCLUSION

IT IS HEREBY ORDERED that the Motion for New Trial is DENIED. DATED this day of 10 November, 2004. Filed and entered 11/10/04.
/s/William D. Browning
Senior United States District Judge 3

App. 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLENN DAVIS,	)	No. 05-15022
Plaintiff - Appellant,	)	D. C. No. CV-00-00032-WDB
V.	)	
CITY OF TUCSON,	)	ORDER
Defendant - Appellee.	)	

Pending before the Court is Plaintiffs Motion for Reconsideration filed on November 30, 2004. Under Local Rule 7.2(g), LRCiv, the non-moving party is not required to respond to a Motion for Reconsideration unless order by the Court. Thus, Court shall make review the Motion as it stands.

On November 9, 2004, the Court denied Plaintiffs Motion for a new trial under Rule 60, Fed.R.Civ.P., to review the actions of the Arizona Court of Appeals and a decision of the Ninth Circuit Court of Appeals, on the basis of violation of right of substantive due process and procedural due process. Plaintiff now files his Motion for Reconsideration on the grounds that "[the Court] did not rule on the Plaintiffs motion as they relate to the Ninth Circuit Court of Appeals June 13, 2002 Memorandum, and the Arizona Court of Appeals January 22, 2004 Memorandum Decision" or his claims "as they relate to this Court's granting Defendants motion for summary judgment and supplemental jurisdiction." Plaintiff is mistaken. The Court considered these claims and has found that a new trial is not warranted and that the Court did not have jurisdiction to consider any of Plaintiffs other claims. Accordingly,

IT IS HEREBY ORDERED that the Motion for Reconsideration is DENIED. DATED this 7th day of December, 2004. Filed and entered 12/10/04.

/s/ William D. Browning
Senior United States District Judge

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

O R D E R
2CA-CV 2003-0081
Department B
Pima County
Cause No. C20015370

RE: DAVIS v. CIVIL SERVICE COMMISSION OF THE CITY OF TUCSON

The above-entitled utter was duly submitted to the Court. The Court has this day rendered its Memorandum Decision.

ORDERED: The Memorandum Decision be filed.

FURTHER ORDERED: A copy. of this order together with a copy of the Memorandum Decision be sent to each party appearing herein or the attorney to: such party.

FILED/DATED: January 22. 2004

/s/ Jeffrey P. Handler
Clerk of the Court

2 CA-CV 2003-0081

Pima County Superior Court Number C20015370

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Hon. Deborah Bernini
Judge
Pima County Superior Court
110 W. Congress
Tucson, AZ 85710

App. 11

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GLENN DAVIS,	)	2 CA-CV 2003-0081
Plaintiff - Appellant,	)	DEPARTMENT B
V.	)	
THE CIVIL SERVICE	)	MEMORANDUM DECISION
COMMISSION OF THE	)	
THE CITY OF TUCSON.)		Not for Publication
Defendant - Appellee.	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA

COUNTY

Cause No. C20015370

Honorable Deborah Bernini, Judge

AFFIRMED

Glenn Davis — Tucson
In Propria Persona

Corey & Kime — Tucson
By Barry M. Corey — Attorneys for Defendant/Appellee

PELANDER , Presiding Judge.

¶1 Appellant Glenn Davis appeals from a Pima County Superior Court judgment upholding a decision by the City of Tucson Civil Service Commission (the Commission) to affirm the city's termination of Davis's employment. Davis also appeals from the superior court's denial of his motion for a new trial.[1] At issue before the Commission was whether Davis had been absent from work for more than one year and whether the city had adequate grounds to discharge him on that basis under the city's applicable standards. We agree with the superior court that substantial evidence supports the Commission's decision and, therefore, affirm.

BACKGROUND

¶2 We view the evidence and reasonable inferences therefore in the light most favorable to upholding the Commission's decision. See Rios Moreno v. Ariz. Dep't of Econ. Sec., 178 Ariz. 365, 367, 873, P.2d 703, 705 (App. 1994). In January 1999, Davis was voluntarily demoted from his position as a senior sanitation worker in the city's Solid Waste Management Department to a position as a recreation assistant with he city's Parks and 'recreation Department. 1n May 1999, the city placed Davis on "medical family leave without pay." On a "medical leave certification form," Davis's psychologist, William Horne, Ph.D., stated that Davis was unable to work because he had been suffering from "major depression" that interfered with his ability to concentrate, sleep, and respond to stress. Home estimated Davis might miss three to five weeks of work because of his condition, but that that time period could be longer if Davis's condition worsened. In August 1999, the city terminated Davis's "family leave status" and placed him on "medical leave without pay.

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[1] In urging us to consider his amended motion for a new trial filed below on December 2, 2002, Davis apparently

contends the trial court did not rule on that motion. But the record reflects otherwise. Conversely, the city is under the misimpression that Davis's motions for new trial were untimely filed, when they were not. See Ariz. R. Civ. P. 58(a) and State Bar Committee Notes to 1961 amendment; 59(d). 16 A.R.S., Pt. 2. in any event, the parties' confusion on this point does not change the result.

2

condition worsened. In August 1999, the city terminated Davis's "family leave status" and placed him on "medical leave without pay.

¶3 As of May 2000, Davis had not yet returned to work and thus had been absent from his employment for one year. On June 13, the city notified Davis that Tucson Administrative Directive 2.01-7 mandated that medical leaves may not be granted for periods longer than one year.2 The city also notified Davis that unless he returned to work by June 28, he would be discharged from employment. When Davis failed to return to work by that date or otherwise provide the city with information as to when he would be returning, the city notified him on July 3 that his employment was terminated, effective August 21.

¶4 Davis appealed his termination to the Commission. After a five-day hearing, it issued findings of fact and upheld the termination. The Commission found, inter alia, that Davis had been absent from work for more than one year, that he "knew or should have known that employment with the City cannot continue when an employee is absent from work for a period in excess of one year, and that leaves of absence may not be permitted for periods of time in excess of one year." The Commission then unanimously decided, "based on the evidence submitted, including the testimony presented and the documentary evidence admitted at the hearing, that there was just cause for ... [his] termination."

¶5 Thereafter, Davis filed a petition for special action in superior court, alleging the Commission had abused its discretion, had acted in excess of its jurisdiction or legal authority, or had acted arbitrarily or capriciously in upholding the city's decision to terminate him. See Ariz. R. P. Special Actions 3, 17B A.R.S. Davis essentially claimed that the Commission had erred because it had not considered the city's alleged failure to process "his request for a reasonable accommodat'on" and to comply with administrative directive relating to the Americans With Disabilities Act (ADA), 42 U.S.C.A. §§ 12101 through 12213.[3]

---

[2]The city previously had informed Davis of that policy and furnished a copy of it him in May 1999, when he first went on family medical leave. In addition, the record reflects Davis was otherwise well aware of the policy from his previous employment with the city.

¶5 Therefore, Davis filed a petition for special action in superior court, alleging the Commission had abused its discretion, had acted in excess of its jurisdiction or legal authority, or had
arbitrarily or capriciously in upholding the city's decision to terminate him. See' Ariz. R. P. Special Actions 3, 173 A.R.S. Davis essentially claimed that the Commission had erred because it had not considered the city's alleged failure to process "his request for a reasonable accommodation" and to comply with an administrative directive relating to the Americans With Disabilities Act (ADA), 42 U.S.C.A. §§ 12101 through 12213.3

¶6 On review, the superior court only considered whether the Commission properly had determined that Davis had been absent frog: work for .more than one year. The court found that tee Commission had not abused its discretion or otherwise acted

improperly in upholding Davis's termination and thus denied him relief. Davis filed a motion or new trial, in. which he also requested the superior court to alter its judgment, issue additional findings, and allow for briefing on the issues. In his amended motion, however, Davis essentially reiterated the claims he had urged in fits special action petition. The superior court summarily denied Davis's motion, anti this appeal Followed.

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[3]Arizona's Civil Rights Act. which is "substantially identical" to the ADA. Civil Rights of Ariz. Dept of Law v. Superior Court, 146 Ariz. 419, 424. 706 P.2d 745, 750 (App. 1985). defines a reasonable accommodation as:

> Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision or qualified readers or interpreters and other similar accommodations for individuals with disabilities.

A.R.S. § 41-1461(9)(b).

DISCUSSION

A. Standard of Review

¶7 "The superior court, in reviewing an administrative determination, may only decide whether the administrative action was illegal in that it was arbitrary, capricious or involved an abuse of discretion." City of Tucson v. Mills, 114 Ariz. 107, 111, 559 P.2d 663, 667 (App. 1976); see also Civil Service Bd. v. Warren, 774 Ariz. 88, 90, 244 P. 2d 1157, 1158 (1952); Pima County v. Pima County Merit Sys. Comm'n, 189 Ariz. 566, 569, 944 P.2d 508, 511 (App. 1997);Maricopa County v. Gottspooner, 150 Ariz. 367, 370, 723 P.2d 716, 719 (App. 1986. the superior court may set aside an administrative decision only when it is not supported by any competent evidence. Pima County, 189 Ariz. at 569, 944 P.2d at 511; Mills, 114 Ariz. at 111, 559 P.2d at 667.

¶8 "These same standards of review apply on appeal from the superior court to this court." Pima County, 189 Ariz. at 569, 944 P.2d at 511; see also Gottspooner, 150 Ariz. at 370, 723 P.2d at 719 (appellate court reviews trial court decisions in appeals from administrative decisions for "whether the record contains evidence of a substantial nature to support the lower court's judgment"). Thus, we independently analyze whether substantial evidence supports the Commission's decision. Pima County, 189 Ariz. at 569, 944 P.2d at 511;
"Whether substantial evidence supports the Merit Commission's findings is a question of law determined independently by this court. "); Gottspooner, 150 Ariz. at 370, 723 P.2d at 719 ("We cannot determine whether trial court exercised its discretion arbitrarily without scrutinizing the underlying question" of whether the evidence supports the Commission's decision.).

B. The Commission's Decision

¶9 The Commission's role in cases such as this is to determine whether "just cause" supports termination of the City employee. See, e.g., Roberts v. City of Tucson, 122 Ariz. 125, 130, 593 P.2d 679, 684 (App. 1978), App'd *in part and vacated in part*, 122 Ariz. 91, 593 P.2d 645 (1979); *Mills*, 114 Ariz. at 110-12, 559 P.2d at 666-68; *Civil Service Comm'n v. Livingston*, 22 Ariz. App. 183, 186-88, 525 P.2d 949, 952-54 (1974); *see also* Tucson Charter, ch. XXII, § 3(c); Tucson Code § 10-20; Rules IX § 2(b), X § 4, Tucson Civil Service Comm'n Rules and Regulations (2000). Generally, "'[j]ust cause' means some substantial shortcoming which renders the continuance of the [employee] in his position detrimental to the discipline or efficiency of the [employer]." Livingston, 22 Ariz. App. at 187, 525 P.2d at 953. The Commission "cannot base 'just cause' upon arbitrary or capricious reasons," but an employee's termination "need not be predicated upon the violation of any particular rule or regulation. " *Id* at 187-88, 525 P.2d at 953-54; *see also Mills* Ariz. at 111, 559 P.2d at 667. And, conflicts in the evidence do not preclude the Commission's finding of just cause to uphold an employee's discharge. *Mills*, 114 Ariz. at 112 n.3, 559 P.2d at 668 n.3 (noting that the Commission, 'as the hearing body, had the opportunity to witness the demeanor and evaluate the credibility of each witness").

¶10 At issue before the Commission was whether Davis had been absent from work for more than one year and, if so, whether the city had Justifiably terminated his employment on that basis. Tucson Administrative Directive 2.01-7 § VI(D) states:

> I . Medical leave without pay may be granted to probationary and permanent employees for up to one year because of

> illness, injury, pregnancy, Childbirth, or related medical conditions. Leaves of more than one week[] are contingent upon providing medical certification from a health care provider...
>
> a. Departments may approve medical leave provided that:
>
> 2. The granting of such leave will not result in an employee's absence from work or for a period longer than 1 year and/or the failure for a period longer than one year, to perform the full range of duties and responsibilities of the classification to which the employee is permanently assigned, and
>
> 3. The employee provides medical documentation reflecting a continuing probability, of anticipated return to work, with or without accommodation.

Tucson Code § 10-12(8) provides that "just cause" exists to discharge a city employee when the employee is "absen[t] from duty without leave" or when he or she has a "physical or mental unfitness [sic] to perform prescribed duties." in view of those provisions, and because substantial, competent evidence supports the Commission's decision, we have no basis for finding "it was arbitrare, capricious, or involved an abuse of discretion." *Mills*, 114 Ariz. at 111, 559 P.2d at 667.

¶11 Jim Convoy, a city Parks and Recreation Department supervisor, testified before the Commission that Davis's family medical leave from that department began in May 1999. A "Personnel Action Request Form," which states that Davis was placed on "medical family leave without pay status effective 05/12/99," corroborates Convoy's testimony. In August 1999, the city terminated Davis's family medical leave status and placed him on medical leave without Pay." Conroy testified that he had spoken with Davis approximately thirteen times while he vas on medical leave to see if Davis's doctor has approved his return to work. During those conversations, Davis never told Conroy that his doctor had done so. Conroy further testified that Davis's eventual discharge from city employment was based solely on his absence from work for a period longer than one year; it had not been based on Davis's previous work Performance or collateral issues relating to any disabilities Davis might have had.

¶12 Dan Felix, director of the Parks and Recreation Department, testified before the Commission that as of June 2000, Davis had been absent from his position for twelve months and had not provided the department with any indication of when, if ever, his doctor would permit him to return to work. Indeed, in a letter to the city dated May 18, Horne stated that at that time, Davis "continue[d] to have symptoms which interfere significantly with [his], daily life and would prevent him from working effectively. Due to his slow response to treatment, it is still not possible to project when he will be able to return to work." Davis also signed the letter, approving the release of the foregoing information.

¶13 On June 13, Felix mailed a letter to Davis notifying him that, pursuant to the city's administrative policies, city employees, even those on approved medical leave, may not be absent 'from, for a period longer than one year. Felix testified

that, as stated in the letter, he had given Davis until June 28 to return to work. When Davis failed to return to work by that date, Felix sent another letter informing him of the department's intent to terminate is employment. Like Conroy, Felix testified that the "sole basis" for Davis's termination was his absence from work for more than one year without any indication of when he could or would return.

¶14 The foregoing evidence clearly supports the Commission's findings that (1) Davis was absent from work for more than one year, (2) he had been notified that city policy requires the termination of employees who are absent for such a period, and (3) he had failed to provide the city with any information as to when he would return to work. Accordingly, the trial court did not err in concluding that the Commission had properly acted within its discretion in upholding Davis's termination. Nor did the trial Court abuse its discretion in denying Davis's motion for new trial. *See Larsen v. Decker*, 196 Ariz. 239, ¶27, 995 P.2d 281, ¶27 (App. 2000) ("We will not reverse denial of [a new trial] motion unless the record and circumstances show it was a manifest abuse of discretion.").

C. Davis's Reasonable Accommodation Request

¶15 As he did below, Davis primarily argues the city failed to reasonably accommodate him under the ADA. That argument, however does not and cannot alter our conclusion that neither the Commission nor the superior court erred. Any issues relating to reasonable accommodation requests were collateral to the central issue of "just cause which the Commission focused on and decided.

¶16 As noted above, the only issue before the Commission was whether Davis had been absent from work for more than one year and, as a result, whether the city had just cause to terminate his employment pursuant to its administrative directives and code. As the city correctly points out, a hearing before the Commission was not the proper forum for litigating the city's alleged failure to reasonably accommodate Davis or any of its other allegedly discriminatory employment practices.[4] *See* 42 U.S.C.A. §§ 2000e-5(a) (empowering Equal Employment Opportunity Commission to hear claims of employment discrimination brought under ADA); 12117(a); A.R.S. § 41-1481(A) (claims of employment discrimination made pursuant to Arizona's Civil Rights Act are to be filed with Arizona's Civil Rights Division); *cf. Hawkins v. State*, 183

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[4]indeed, Davis apparently understood that and filed an action against the city in federal district court. The record contains a memorandum decision of the Ninth Circuit Court of Appeals that affirmed the district courts summary judgment in favor of to city and against Davis on his various claims of employment discrimination and retaliation.

Ariz. 100, 104, 900 P.2d 1236, 1240 (App. 1995) (state personnel board's determination that cause existed for employee's demotion did not preclude employee from bringing clam under state Civil Rights Act because discrimination claims are separate and distinct").

¶17 Accordingly, Davis's arguments about the city's failure to process, and the Commission's failure to consider, his requests for reasonable accommodation do not alter our analysis or conclusion. Similarly, his reliance on the ADA and on the city's Administrative Directive 2.05-2 is misplaced. That directive is entitled "Reasonable Accommodation of Applicants and Employees with Disabilities." Davis cites no authority for his position that it somehow "cancel [led] out Administrative Directiive 2.01-7 § VI(D) or exempted him from a the latter. We therefore reject that position as well as Davis's argument that Administrative Directive 2.05-2 "undermines the Commission's decision."[5] And we do not address any issues relating to whether the city 'failed to reasonably accommodate Davis under the ADA or otherwise failed to comply with Administrative Directive 2.05-2.

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[5]We note that under Administrative Directive 2.05-2(VIII), "[i]nformal or formal complaints will be handled in accordance with Administrative Directive 2.05-4, 'EEO Complaint procedures ." Although Directive is not contained in the record, its title suggests a different procedural mechanism to be followed for discrimination and disability claims, separate from and independent of the Commission proceedings, in which the issue of "just cause" is determined. We further note that Davis's request for reasonable accommodation in June 1998, referred to in his opening brief, is neither contained in the record nor relevant to the issue here. *See city or Phoenix v. Superior Court* : 110 Ariz. 155, 158, 515 P.2d 1175, 1178 (1973) (on special action taken from administrative decision, court is limited to

reviewing administrative record). Finally, Davis's June 27, 2000 request for "reasonable accommodation under the ADA for light duty as a Senior Sanitation Worker," though contained in the record , fell outside the pertinent one-year time frame prescribe Administrative Directive 2.01-7 § V1(D) and does not undermine the Commission's decision.

10

DISPOSITION

¶18 The superior court's judgment and its denial of Davis's motion for new trial are affirmed.

/s/JOHN PELANDER, Presiding Judge

CONCURRING:

/s/PETER J. ECKERSTROM, Judge

/s/J. WILLIAM BRAMMER, JR., Judge

CIVIL SERVICE COMMISSION
CITY OF TUCSON

DECISION IN THE MATTER OF:

NAME: GLENN DAVIS

SUBJECT: APPEAL FROM DISCHARGE

DATE(S): August 21, 22, 28, 29, and October 11, 2001

The Civil Service Commission of the City of Tucson met in open session in the Human Resources Department Conference Room on August 21, August 22, August 28, August 29 and October 11, 2001, for the appeal filed by Glenn Davis for his dismissal from the Parks and Recreation Department of the City of Tucson. Commissioners present for all parts of the hearing were Ed Kelly, Chair, and Tiana Smith and Jimmy Fisher, Commissioners. Also in attendance were the Appellant, Glenn Davis, in propria persona, Jack Redavid, Secretary for the Civil Service Commission, Julianne Hughes, attorney for the City of Tucson, and Barry M. Corey, attorney for the Civil Service Commission.

Based upon the testimony presented and the documentary evidence submitted, the Civil Service Commission of the City of Tucson makes the following findings of fact and enters the following decision:

1. Appellant had been a Senior Sanitation Worker in the Solid Waste Management Department of the City of Tucson prior to January 19, 1999.

2. During 1998, for approximately four months, Appellant was transferred from the Solid Waste Management Department to the City's Transportation Department as a

reasonable accommodation under the Americans with Disabilities Act.

Decision in the Matter of: GLENN DAVIS

3. On or about January 19, 1999, as a voluntary demotion, Appellant was transferred to a probationary position in the Parks and Recreation Department of the City of Tucson, at which time he was permanently assigned to the position of Recreation Assistant in the City of Tucson Parks and Recreation Department.

4. The Appellant was absent from work without pay due to a non-industrial medical condition beginning May 12, 1999.

5. On or about July 19, 1999, Appellant passed his probationary period and became a permanent employee in the position of Recreation Assistant in the Parks and Recreation Department of the City of Tucson.

6. As of mid-May, 2000, Appellant had been absent from work for a period of time exceeding one year.

7. A letter submitted by one of Appellant's health care providers (William C. Horne, Ph.D.) on May 18, 2000, stated that it was "still not possible to project when [the Appellant would] be able to return to work". The release of this information was approved by the Appellant.

8. On or about August 21, 2000, the Appellant was given notice of the termination of his employment.

9. The City of Tucson's Administrative Directive No. 2.01-7 provides in pertinent part, at subparagraph D of Section VI, that "departments may approve medical leave provided that: ...2. the granting of such leave will not result in an employee's absence from work for a period longer than one year and/or the failure, for a period longer than one year, to perform the full range of duties and responsibilities of the classification to which the employee is permanently assigned ..."

10. The Appellant knew or should have known that employment with the City cannot continue when an employee is absent from work for a period in excess of one year, and that leaves of absence may not be permitted for periods of time in excess of one year.

11. The services provided by the City of Tucson require that employees hired to perform those services be physically present on the job to perform the services.

12. There is good reason for the City's policy since the absence of an employee for a period of more than one year is so disruptive to the functioning of City government that it cannot be tolerated.

At the conculsion of the hearing, it was moved by Tiana Smith and seconded by Jimmy Fisher that the decision of the City of Tucson in terminating the employment of Glenn Davis be upheld. The motion was unanimously passed. Therefore, based on the evidence submitted, including the testimony presented and the documentary evidence admitted at the hearing, the Civil Service Commission of the City of Tucson unanimously concluded that there was just cause for the

disciplinary action imposed and upheld the termination of Glenn Davis from his employment with the City of Tucson.

/s/Ed Kelly. Chair
Civil Service Commission

/s/Tiana Smith. Commissioner

/s/Jimmy Fisher. Commissioner

Glenn Davis
Notice of intent to Terminate
Exhibit A

Absence from work for more than one year

You have been. absent from work without pay due to a non-industrial medical condition since May 12. 1999. At that time. you were placed on family and medical leave. Your sick leave and vacation leave had previously been exhausted.

Your request for absence was made and was granted just after you had been placed in the position of Recreation Assistant. as a reasonable accommodation for a medical condition unrelated to the medical condition causing your present absence.

You have been advised on more than one occasion that pursuant to City Administrative Directive 2.01-7. Departments may not grant a medical leave. including time off of work on family and medical leave. which results in an employee's absence from work for a period longer than of year. or failure. for a period longer than one year. to perform the duties and responsibilities of the classification to which the employee is permanently assigned.

In fact. you had previously been off work for medical reasons for approximately one year from December. 1996. through December. 1997. and had similarly been advised by letter of December 23. 1997: that unless you returned to work by January 5. 1998. you would be discharged from work as provided by administrative directive 2.01-7. Although your discharge did not occur on that occasion as you returned to work. you unquestionably have long been aware that

employment cannot continue when employees are absent for more than one year.

More recently, regarding your present absence, you were advised by letter dated June 13, 2000, that your employment with the City would be terminated unless you were able to obtain a release to return to work in the position of Recreation Assistant by June 23, 2000. This was necessary since you have again been absent on medical leave for more than one year and because information you recently furnished indicated that as of May 15, 2000, your medical provider was unable to project a return date to work.

As of June 29, 2000, you have not presented any documentation indicating, your ability to return to work with or without accommodation in the position of Recreation Assistant in which you were accommodated.

Just Cause for Termination

A.D. 2.01-7 section V1 D. in part provides, "Department may approve medical leave provided that: The granting of such leave will not result in an employee's absence from work for a period longer than one year, and/or failure, for a period longer than one year, to perform, the full range of duties and responsibilities of the classification to which the employee is permanently assigned" Specifically, as of June 28, 2000, you have either been unable to perform your job duties for one year, or have not returned to work.

Pursuant to Tucson Code Section 10-10(8), the foregoing constitutes just cause for your discharge from City employment.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN DAVIS,
Plaintiff Appellant.D.C.
v.

CITY OF TUCSON,
Defendant-Appellee.

No. 01-17102
No. CV-00-00032-WDB

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Submitted June 10, 2002"

Before:O'SCANNLAIN, BERZON, and RAWLINSON, Circuit Judges.

Glenn Davis appeals pro se the district court's summary judgment dismissing his Title VII action alleging race, national origin, gender, religion and

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Because the panel unanimously finds this case suitable for decision without oral argument, Davis' request for oral argument is denied. See Fed. R. App. P. 34(a)(2).

disability discrimination and retaliation. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's summary judgment. *Margolis v. Ryan, 140* F.3d 850, 852 (9th Cir. 1998), and we affirm.

The district court properly granted summary judgment on Davis's Title VII claims because Davis failed to raise a genuine issue of material fact as to whether his employer terminated him due to a discriminatory or retaliatory motive. *See Sischo-Nownejad v. Merced Comm. College Dist.*, 934 F.2d 1104, 1109-10 (9th Cir. 1991) (discrimination); *Hashimoto v. Dalton*, 118 F.3d 671, 679 (9th Cir. 1997) (retaliation).

Davis's remaining contentions lack merit.

All outstanding motions are denied.

AFFIRMED.

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Date filed June 13, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLENN DAVIS.)	No. CIV 00-32-TUC-WDB
Plaintiff.)	ORDER
VS.)	
CITY OF TUCSON.)	
Defendant.)	

Pending before the Court is Defendant's Motion for Summary Judgment on all the issues presented by Plaintiff. Briefing and oral argument has been held on the motion. The Motion for Summary Judgment is GRANTED in part and further briefing is requested on the claim of violation of procedural due process.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is an African-American male. Mr. Davis previously was employed by the City's solid waste disposal department, in a union position. Because of a chronic back injury he became disabled. As an accommodation for his disability the City transferred Mr. Davis to a position as a customer service clerk in the Streets and Traffic division, subject to a six month probationary period. The position is not considered a union position. Mr. Davis was the only male employee in the position. Before the six-month probationary period was completed, Mr. Davis received less than satisfactory performance evaluations. At the end of the six months he was transferred to Parks and Recreation as a recreation assistant. He was again placed on six months probation, which he failed to complete satisfactorily. Plaintiff requested and was granted leave under the Family and Medical Leave Act ("FMLA") in May 1999. In August 1999 he was placed on medical leave without pay. On August 21, 2000,

because he had failed to return to work, the City terminated his employment.

Plaintiff filed this suit on January 14, 2000. He has made ten claims for relief: (1) intentional discrimination in violation of Title VII; (2) hostile work environment; (3) illegal retaliation in response to a previous ACRD complaint; (4) violation of the Americans with Disabilities Act ("ADA"); (5) violation of equal protection because of discrimination based on race, sex and disability; (6) violation of due process as a result of being denied his union grievance rights when transferred to a non-union job; (7) constructive discharge; (8) intentional infliction of emotional distress; (9) wrongful termination in violation of public policy; and (10) breach of the implied covenant of good faith and fair dealing.

II. DISCUSSION

To make *a prima facie* case of discrimination under Title VII, Plaintiff must offer evidence that (1) he belongs to a protected class; (2) he was performing adequately in his job; (3) he suffered an adverse employment action; and (4) similarly situated employees were treated more favorably. *Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220* (9th Cir. 1998). If the plaintiff establishes a prima facie case, then the burden shifts to the defendant to show a legitimate reason for the adverse action. *Id.* The burden then shifts back to the plaintiff to show that the reason given is pretextual. *Id.*

Defendant argues that the Plaintiff cannot establish *a prima facie* case of intentional discrimination because he cannot establish that he was performing according to the expectations of him in his employment. Additionally, Defendant argues that even were Plaintiff able to establish *a prima facie case*, he cannot show that Defendant's legitimate reason for the adverse action is pretextual. Defendant makes the same argument in response

to Plaintiff's ADA claim, equal protection claim, and public policy claim. A review of the evidence shows that, notwithstanding whether Plaintiff has made a sufficient *prima facie* case, he cannot show the Defendant's legitimate non-discriminatory reasons for the adverse employment action is pretextual. As a result, claims 1, 4, 5 and 9 cannot survive summary judgment.

To bring his hostile workplace claim, Plaintiff must show that (1) he was subjected to verbal or physical conduct of a racial or sexual nature, (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. *Gregory v. Widnal*, 153 F.3d 1071, 1074 (9th Cir. 1998). Plaintiff has only made a showing of one incident that might be characterized as unwelcome racial conduct-- an off-color racial joke. However, this is not sufficiently severe or pervasive to create an abusive work environment. Thus, Plaintiff's hostile workplace claim fails. For the same reason, Plaintiffs claims of intentional infliction of emotional distress and constructive discharge must also fail, as he has not made a minimal showing that there was intentional or reckless outrageous conduct occurring at his place of work that was so intolerable that a reasonable person would either suffer emotional distress or feel forced to resign.

Plaintiff claims that he was illegally retaliated against because the Human Resources department knew of *his previous ACRD* complaint. However, he has not shown that his supervisors knew of the complaint. As a result he cannot *show that he is* being retaliated against and the claim must fail.

Finally, Plaintiff's claim of breach of the covenant of good faith and fair dealing fails, because Plaintiff has not provided evidence that the City took any action to deny him of any contractual benefits to which he was entitled.

However, it is unclear whether Plaintiffs claim of violation of procedural due process, as a result of his not retaining his union grievance rights, survives summary judgment. Common sense suggests that an employer may not deny an employee the benefits he had in

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his original employment, simply because he has availed himself of the protections of the ADA. Conversely, the ADA does not require an employer to change the essential nature of a position because the employer is accommodating an individual under the ADA. Thus, the Court requests the parties provide further briefing on this issue.

Accordingly,

IT IS HEREBY **ORDERED** that Defendant's Motion for Summary Judgment is GRANTED as to the claims of (1) intentional discrimination in violation of Title VII; (2) hostile work environment; (3) illegal retaliation; (4) violation of the ADA; (5) violation of the equal protection; (7) constructive discharge; (8) intentional infliction of emotional distress; (9) wrongful termination in violation of public policy; and (10) breach of the implied covenant of good faith and fair dealing.

IT IS FURTHER **ORDERED** that the parties shall file additional briefing on the claim of violation of procedural due process no later than May 25, 2001. DATED this 30'" day of April, 2001.

Filed May 1, 2001

/s/William D. Browning
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLENN DAVIS,	)	No. CIV 00-32-TUC-WDB
Plaintiff,	)	ORDER
vs.	)	
CITY OF TUCSON,	)	
Defendant.	)	

Pending before the Court is Defendant's Motion for Summary Judgment, one issue of which has not yet been decided. After granting Defendant's Motion on all Plaintiff's claims but one, the Court requested the parties supplement their Memorandums of Points and Authorities to address the question of whether it is a denial of procedural due process to change the benefits due an employee when he is transferred into a new job in order to accommodate a disability under the Americans with Disabilities Act ("ADA"). Also pending is Plaintiff's motion for reconsideration of the Court's earlier order, granting summary judgment to the Defendant on the other claims made by Plaintiff

It appears that there is no case law implicating the ADA directly on point on this issue in any of the circuits. Accordingly, an analysis of the situation will be made under traditional procedural due process considerations. The procedural due process protections of the Fourteenth Amendment apply to deprivations of property interests. The existence and breadth of these property interests "are defined by existing rules or understandings that stem from an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Thus, the Court must look to state and municipal law to determine whether Plaintiff had a property

interest in retaining his union grievance rights when he transferred from a union position to a non-union one.

This situation can be usefully compared to that in McGraw v. City of Huntington Beach, 882 F.2d 384 (9th Cir. 1989). In McGraw, the plaintiff had completed a probationary period in her original job and had become a "permanent" employee with property rights for procedural due process purposes. She was then promoted. The City placed her on probationary status again, which she did not successfully complete. Plaintiff successfully argued that even if she did not have a property interest in her new position, she did in her old one and could not be terminated without cause. The court noted, when considering the parameters of the property interest, that the City's civil service rules did not clearly address the difference between an initial probationary employee and what it described as "promotional probationary" employee. The court held that a reasonable employee would not consider herself "non-permanent" simply because she had accepted a promotion. See id. at 391.

The proper analysis of whether a property interest exists is whether a reasonable employee, taking into consideration the civil service rules, could believe she had a property interest. Under Tucson's civil service rules a reasonable employee's expectations would likely be that a transfer from a union position to a non-union position would entail different benefits and procedures. Instructive are the union contract that governed Plaintiffs original position and Civil Service Rule VII, § 1. The union contract defers to municipal law. The Rule states that "[e]mployees who are appointed to a classification through transfer... shall serve in a probationary period if a probationary period in that classification has not been completed." The Plaintiff could not have had any reasonable expectation that he would not be required to complete a probationary period, under the rules of the new classification when

he transferred from his solid waste position to a position as a customer service representative.

As to the question whether Plaintiff should have been afforded his union grievance rights when he moved into a non-union position, a reasonable employee would realize that by accepting a transfer to a customer service position, he was moving out of a labor and trades position covered by the union bargaining agreement and into one governed by the civil service rules. In McGraw, the court held that the plaintiff retained her permanent status in her old position even if she did not successfully complete the probationary period in her new position. Likewise, Plaintiff could reasonably expect that in his new position he was subject to the probationary status as it existed there, but that his property interests acquired in his old position would remain, were he move back to that position. He could not reasonably expect that his new non-union position would be governed by the bargaining agreement.

Plaintiff was not required to accept this accommodation, and so voluntarily accepted the change in his status. Thus, a procedural due process violation could not have occurred.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment as regards Plaintiffs claim of violation of procedural due process is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs Motion for Reconsideration is DENIED.

DATED this June 4, 2001 Filed this June, 4, 2001

/s/William D. Browning
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA-

GLENN DAVIS.	)	No. CIV 00-32-TUC-WDB
Plaintiff.	)	
vs.	)	DEFENDANT'S OPPOSITION TO
CITY OF TUCSON.	)	PLANTIFF'S MOTION FOR
Defendant.	)	NEW TRIAL

Defendant City of Tucson ("City") hereby responds to and opposes Plaintiff's Motion for New Trial (signed August 27. 2004. and served by mail August 30. 2004). This Opposition is supported by the accompanying Memorandum of Points and Authorities. and all matters of record. which are incorporated herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

More than three years after this Court entered *judgment in his case (see Doc. 81.* entered June 4. 2001) and almost two years after the Ninth Circuit denied Plaintiffs request for en banc rehearing of the Ninth Circuit's memorandum decision summarily affirming this Court's judgment *(see* Sept. 11. 2002 Order. Davis v. City of Tucson. 9th Cir. No. 0117102). [1]Plaintiff has now filed what he styles as a "motion for new

trial" but which invokes Fed. R. Civ. P. 56. 60. and 62: Ariz. R. Civ. P. 64-65; and the Seventh and Fourteenth

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[1]Plaintiff did not file a petition for certiorari with the Supreme Court.

Amendments of the U.S. Constitution. Strangely, not only does Plaintiff seek to reopen the federal case that this Court adjudicated, he seeks relief with respect to state appellate court proceedings arising from his appeal of an adverse determination by the City of Tucson's Civil Service Commission.

This Court should summarily deny Plaintiffs motion. The City will not address Plaintiff's obviously inappropriate request for this Court to grant relief with respect to separate state court proceedings. However, the Court should deny Plaintiffs request to reopen his federal case for the following reasons:

1. The time for filing a motion for new trial is long past, *see* Fed. R. Civ. P. 59(b) ("Any motion for a new trial ***shall*** be filed ***no later than 10 days after entry of the judgment");

2. No provision of Fed. R. Civ..P. 56 provides for the reopening of case in which judgment has been entered and, to the extent that Plaintiff believes that the Court did not fully adjudicate his complaint during the summary judgment proceedings, he is mistaken *(see* Doc. 73, entered May 1, 2001; Doc. 80, entered June 4, 2001);

3. Fed. R. Civ. P. 62 (providing for stays of an adverse party's attempt to ***enforce*** a judgment) does not provide a basis for the requested relief;

4. Plaintiff's right to a jury trial under the Seventh Amendment to the U.S. Constitution does not guarantee a trial or trump a summary judgment under Fed. R. Civ. P. 56;

5. Plaintiff's citation of the Fourteenth Amendment to the U.S. Constitution is inapposite; it does not provide a basis for the requested relief;

6. Motions for relief from judgment under Fed. R. Civ. P. 60(b)(1) (mistake, inadvertence, surprise or excusable neglect) must be brought within one *year* after the judgment was entered *(see In to* GAD, Inc.., 340 F.3d 331, 334 (6th Cir. 2003))), and therefore Plaintiffs motion is untimely;

7. Motions for relief from judgment under Fed. R. Civ. P. 60(b)(2) (newly discovered evidence) must be brought within one year after the judgment was entered *(see* In re GAD, Inc., 340 F.3d at 334), and therefore Plaintiffs motion is untimely;

8. Motions for relief from judgment under Fed. R. Civ. P. 60(b)(3) (fraud, misrepresentation, or other misconduct by the adverse party) must be brought within one year after the judgment was entered (see In re GAD, Inc., 340 F.3d at 334), and therefore Plaintiffs motion is untimely; and

9. Motions for relief from judgment under Fed. R. Civ. P. 60(b)(6) (in the interests of justice) must be brought within a reasonable time after the judgment was entered *(see In re GAD, Inc.,* 340 F.3d at 334), and therefore Plaintiffs motion is untimely; Further, relief under Rule 60(b)(6) is reserved for "extraordinary circumstances" *(see* Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998) (relief under Rule 60(b)(6) should be granted "sparingly"), *cert. denied, 526 U.S.* 1040 (1999)); Finally, relief under Rule 60(b)(6) requires a demonstration of actual injury and the presence of circumstances beyond the movant's control that prevented timely'dction to protect the movant's interests (see Lehman, 154 F.3d 1010, 1017).

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CONCLUSION

For all the reasons stated above, Defendant respectfully requests the Court summarily deny Plaintiffs Motion for New Trial.

RESPECTFLULLY SUBMITTED this 2nd day of September 2004.

GABROY, ROLLMAN & BOSSE, P.C.

By:
/s/Richard A. Rollman
Richard A. Brown
Craig L. Cline
Attorneys for Defendant

Copy of the foregoing mailed
this 2nd day of September 2004, to:

Glenn Davis, Plaintiff, *pro se*
P.O. Box 26232
Tucson, Arizona

/s/ Gossill

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IN THE SUPREME COURT
STATE OF ARIZONA

GLENN DAVIS,	)	No. CV 04-0111-PR
Plaintiff,	)	(Arizona Court of Appeals
vs.	)	Case No. 2 CA-CV 2003-0081;
CITY OF TUCSON,	)	Pima County Superior Court
Defendant.	)	Case No. 20015370

RESPONDENT'S RESPONSE TO PETITIONER'S PETITION FOR REVIEW

COMES NOW Respondent, the Civil Service Commission of the City of Tucson (hereinafter referred to as "Respondent" or the "Commission"), and opposes Petitioner's Petition for Review for the reasons set forth below.

QUESTIONS PRESENTED BY PETITIONER FOR WHICH REVIEW WOULD BE IMPROPER

In his Petition for Review, Respondent Glenn Davis (hereinafter referred to as "Respondent" or "Mr. Davis")

requests the review of three questions:

1. Whether the City's Administrative Directive 2.1-7, §VI(D), mandates the City of Tucson to consider a number of City administrative directives regarding Family and Medical Leave Act procedures for employees who suffer disabilities, and documentation reflecting an anticipated return to work when determining how to deal with an employee who has been absent on medical leave without pay for more than a year. Further, Petitioner appears to request a determination regarding whether these various administrative directives prohibit or limit the City's authority to discharge an employee who has been absent for medical reasons for more than one year.

2. Whether the Court of Appeals erred when it failed to remand this case back to the Commission based on what Petitioner alleges as insufficient hearing notice and insufficient evidence to support the Commission's decision.

3. Finally, Petitioner asks the Court to determine, as a factual matter, when Petitioner knew or when he should have known that his employment could not continue with the City of Tucson.

Beyond these three questions, Petitioner has included sections entitled "Issues Decided by Court of Appeals: Presented for Review" and "List of Additional Issues Presented to but Not Decided by Court of Appeals Which Need to Be Decided If Review Is Granted". However, both of these sections of the Petition for Review seem to consist entirely of excerpts from the Court of Appeals Memorandum Decision. There is simply no way to discern precise questions for review from these extended excerpts. Thus, Petitioner has not presented any additional questions which he believes this Court would need to decide if review were granted.

MATERIAL FACTS AND PROCEDURAL HISTORY

Petitioner, a Recreation Assistant for the City of Tucson, was

discharged from his employment, effective August 21, 2000. Petitioner appealed the discharge to the Civil Service Commission of the City of Tucson, and a hearing was held on August 21, 22, 28, 29, and October 11, 2001, before a quorum of the Commission. At the conclusion of the hearing, the Commission upheld the decision of the City of Tucson (hereinafter referred to as "the City") to discharge Mr. Davis. The Commission later issued a written Decision, in which it set forth its findings of fact and its conclusion that, based upon the evidence presented, "there was just cause for the disciplinary action imposed" and upheld the termination of Glenn Davis from his employment with the City of Tucson.

Mr. Davis was transferred to the Parks and Recreation Department in January 1999 after he accepted a voluntary demotion from the Solid Waste Department (Petitioner's Appendix to his Petition for Review (hereinafter referred to as "Davis App."), Ex. 3, No. 7). During the course of his employment, Mr. Davis was not able to fulfill his job responsibilities due to lifting restrictions. On or about April 17, 1999, Mr. Davis received an unfavorable mid-term evaluation and his superiors made the decision to move him into a Recreation Assistant position within the Sports Unit. Mr. Davis was aware of this decision and participated in discussions with his supervisors regarding the evaluation and transfer.

Mr. Davis never reported to his position in the Sports Unit because he was placed on medical leave by his psychologist. The City granted Mr. Davis leave under the Family and Medical Leave Act ("FMLA") for twelve weeks, beginning on May 12, 1999 (Davis App., Ex. 3, No. 7). Jim Conroy, a supervisor, was in contact with Mr. Davis throughout this leave. On August 2, 1999, Mr. Davis' FMLA leave expired and he was placed on non-paid medical leave (Davis App., Ex. 3, No. 7). As of May 13, 2000, Mr. Davis had been absent from work for a period of time in excess of twelve months. By letter dated May 18, 2000, Petitioner's treating psychologist informed

the City that

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"Mr. Davis continues to have symptoms which interfere significantly with daily life and which would prevent him from working effectively. Due to his slow response to treatment. it is still not possible to project when he will be able to return to work." (Davis App., Ex. 3, No. 4.) Mr. Davis received a letter dated June 13, 2000, informing him that City departments may not grant leaves for periods longer than one year (Davis App., Ex. 3, No. 3). In that letter, Dan Felix stated, "[u]nder the foregoing circumstances the City of Tucson has no alternative but to terminate you from employment unless you are released to work in the position in which you were previously accommodated of [sic] recreation assistant and return to work by June 28, 2000." *Id.* At no time did Mr. Davis provide evidence to his employer that he would ever be able to return to work. Subsequently, as a result of his continued absence, the City began the process of terminating his employment. In his Petition for Review, Petitioner argues that he did inform the City that he would be able to return to work before June 28, 2000, based on a request dated June 27, 2000 for reasonable accommodation under the Americans with Disabilities Act ("ADA") for light duty as a Senior Sanitation Worker. The Court of Appeals ruled that this June 27, 2000 request does not undeiinine the Commission's decision because it fell outside the one-year time frame prescribed by Administrative Directive 2.01-7. §VI(D). It should also be noted that this belated request was not directed toward returning to Mr. Davis' current position *with the* City.

On July 3, 2000, Mr. Davis was served with a Notice of Intent to Discharge, which notified him of the City's intent to terminate his employment based upon City of Tucson Administrative Directive 2.01-7. §VI (Davis App.,

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Ex. 3, No. 1 and No. 2), and Tucson Code § 10-12.[1] Mr. Davis was provided with a pre-termination hearing on August 21, 2000, after which Dan Felix, Director of the Parks and Recreation Department, decided that Mr. Davis' employment as a Recreation Assistant should be terminated, effective August 21, 2000 (Davis App., Ex. 3, No: 1).

Mr. Davis was dismissed due to his absence for a period of over fifteen months, for a violation of City of Tucson Administrative Directive 2.01-7, §VI (Employee Leaves), and Tucson Code § 10-12(8).

Mr. Davis appealed the City's decision to the Civil Service Commission, which, after a five-day hearing, upheld the decision to terminate Mr. Davis' employment. The single issue presented to the Commission was whether the Petitioner's continued absence from work constituted just cause which warranted his dismissal.

After a full evidentiary hearing, the Commission issued a written Decision, including its findings of fact, upholding Petitioner's dismissal. The Decision of the Civil Service Commission contained twelve separately numbered findings of fact and concluded "that there was just cause for the disciplinary action imposed" and upheld Mr. Davis' termination. (Respondent set forth the evidence that was before the Commission which supports each of the twelve findings in the Commission's Decision in its brief filed with the Court of Appeals. Respondent has included this portion of the brief the Commission filed

[1] The notice erroneously referred to § 10-10(8). There is no §10-10(8); however §10-12(g) specifically addresses disciplinary actions against employees for a variety of reasons, including "absence from duty without leave" and "physical or mental unfitness to perform prescribed duties'. In any event, there is no basis for Petitioner to argue, as he does for the first time in his Petition for Review, that this typographical error has legal significance. Certainly, the reference to Administrative Directive 2.01-7 is sufficient.

CERTIFICATE OF SERVICE

BARRY M. COREY hereby certifies that, on the 30th day of April, 2004, he caused two (2) copies of the foregoing Respondent's Response to Petitioner's Petition for Review to be served upon the Petitioner, by having copies deposited in the United States mail, postage prepaid, properly addressed, as follows:

Glenn Davis
Post Office Box 26232 Tucson, Arizona 85726
Petitioner in Propria Persona

/s/ Barry M. Corey